(23,147)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 226.

WILLIAM H. GARLAND, PLAINTIFF IN ERROR,

vs.

THE STATE OF WASHINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

	Original.	Print
Transcript from the superior court of the State of Washington for King county	1	1
Information	1	1
Second information	3	2
Precipe for transcript	6	4
Criminal appearance docket	7	5
Motion directed to second information	9	7
Appearance docket, December 17	10	8
Extracts from statement of facts	11	8
Exceptions of defendant to instructions	13	9
Verdict of jury	14	10
Motion for new trial	15	10
Appearance docket, February 25, 1911	16	11
Extracts from appellant's brief	17	11
Respondent's brief	19	13
Appellant's reply brief	20	13
Petition for rehearing	20	13
Notice of appeal	23	14
Opinion	24	15
Supplemental opinion	30	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1913.

	Original.	Print
Judgment	31	20
Petition for writ of error	32	20
Assignment of errors	34	21
Order allowing writ of error	37	23
Bond on writ of error	38	24
Citation and service	40	25
Writ of error	42	26
Præcipe for record to be returned with writ of error	45	27
Supplemental præcipe	49	30
Acceptance of service of præcipe	50	30
Clerk's certificate	51	31

In the Superior Court of the State of Washington for King County.

No. 5269.

STATE OF WASHINGTON, Plaintiff,
vs.
WILLIAM H. GARLAND, Defendant.

Information.

I, George F. Vanderveer, Prosecuting Attorney in and for the County of King, State of Washington, come now here in the name of and by the authority of the state of Washington, and by this information do accuse William H. Garland of the crime of grand larceny committed as follows, to wit:

He, said William H. Garland, in the county of King, state of Washington, on the 10th day of January, A. D. 1910, did fraudulently falsely, designedly, unlawfully and feloniously pretend and represent to one Job L. Beardslee that a certain corporation known as the Apex Coal Company, of the city of Seattle, in said state of Washington, then and there owned a coal mine at Coos Bay in the state of Oregon; that it was then engaged in shipping coal into the city of Portland, in the state of Oregon, and was operating a line of steamers between said Coos Bay and said city of Portland, and was then delivering daily to the yard of said corporation in said city of Portland several hundred tons of coal; that said corporation then owned one hundred thousand dollars ($100,000) worth of bonds in the Consolidated Coal Company of St. Louis, which bonds had never at any time been of any value less than the sum of one hundred and three dollars ($103) each; and that said corporation then had on deposit with The National Bank of Commerce, at said city of Seattle, government bonds of the value of thirty nine thousand dollars ($39,000) upon which said corporation could at any time realize the sum of thirty thousand dollars ($30,000). And said Job L. Beardslee, then and there believing the false pretenses and representations so made by said William H. Garland, and being then and there deceived thereby, was then and there induced, by reason thereof, to deliver and did then and there deliver to said William H. Garland the sum of one thousand dollars ($1,000) in lawful money of
2 the United States, the property of said Job L. Beardslee, in payment of ten shares of the stock of said corporation. And said William H. Garland did then and there fraudulently, unlawfully and feloniously receive and obtain said money by means of said false and fraudulent pretenses and representations, with intent then and there to deprive and defraud said Job L. Beardslee thereof:

Whereas, in truth and in fact, said corporation did not then own a coal mine at said Coos Bay; it was not then engaged in shipping coal into said city of Portland, and was not then operating a line of steamers between said Coos Bay and said city of Portland; it was not

then delivering daily to its yard in said city of Portland several hundred tons of coal, or any amount of coal whatsoever; it did not then own one hundred thousand dollars ($100,000) worth of bonds of said Consolidated Coal Company of St. Louis, or any bonds whatsoever of said company; and did not then have on deposit with said The National Bank of Commerce at said city of Seattle, government bonds of the value of thirty nine thousand dollars ($39,000) or any government bonds of any value whatsoever, and each and all of the pretenses and representations then and there so made by said William H. Garland to said Job L. Beardslee were in all respects utterly false and untrue—all of which he, said William H. Garland, then and there well knew.

Contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington.

GEORGE F. VANDERVEER,
Prosecuting Attorney.

STATE OF WASHINGTON,
County of King, ss:

George F. Vanderveer, being first duly sworn on oath says that he is the prosecuting attorney in and for the county of King, state of Washington; that he has read the foregoing information, knows the contents thereof, and believes the same to be true.

GEORGE F. VANDERVEER.

Subscribed and sworn to before me, this 18 day of March, 1910.

[SEAL.]

D. K. SICKELS,
Clerk of the Superior Court of King County, State of Washington,
G. A. GRANT, *Deputy.*

Witnesses for the State.

Chet Belding, Charles B. Woods, Job. L. Beardslee, L. K. Church, Fred N. Kneeland, M. M. Freeman, Rob't E. Walker, J. J. Crofut.

Filed Mar. 18, 1910.

D. K. SICKELS, *Clerk.*

3 In the Superior Court of the State of Washington for King County.

No. 5269.

STATE OF WASHINGTON, Plaintiff,
vs.
WILLIAM H. GARLAND, Defendant.

Second Information.

I, George F. Vanderveer, prosecuting attorney in and for the county of King, state of Washington, come now here in the name of and by the authority of the state of Washington, and by this infor-

mation do accuse William H. Garland of the crime of grand larceny, committed as follows, to wit:

He, said William H. Garland, in the county of King, state of Washington, on the 10th day of January, A. D. 1910, with intent to defraud, did fraudulently, falsely, designedly, unlawfully and feloniously pretend and represent to one Job L. Beardslee that a certain corporation known as The Apex Coal Company, of the city of Seattle, in said state of Washington, then and there owned a coal mine at Coos Bay in the State of Oregon; that said Apex Coal Company was then engaged in shipping coal into the city of Portland, in the state of Oregon, from Coos Bay, and was then operating a line of steamers between said Coos Bay and said city of Portland, and was then delivering daily to the yard of said corporation in said city of Portland several hundred tons of coal; that said corporation then owned one hundred thousand dollars worth of bonds in the Consolidated Coal Company of St. Louis, which bonds had never at any time been of any value less than the sum of one hundred and three dollars for each; and that said corporation then had on deposit with The National Bank of Commerce, at said city of Seattle, government bonds of the value of thirty nine thousand dollars, upon which said corporation could at any time realize the sum of thirty thousand dollars. And said Job L. Beardslee, then and there believing the false pretenses and representations so made by said William H. Garland,

4 and relying thereon, and being then and there deceived thereby, was then and there induced by reason thereof, and not otherwise, to deliver and did then and there deliver to said William H. Garland a check payable for the sum of one thousand dollars in money, and said William H. Garland did receive on said check on demand for the payment thereof the sum of one thousand dollars in money, the check, money and property of said Job L. Beardslee, in payment of ten shares of the stock of said corporation. And said William H. Garland did then and there fraudulently, unlawfully and feloniously receive and obtain said money by means of said false and fraudulent pretenses and representations, with intent then and there to defraud.

Whereas, in truth and in fact, said Apex Coal Company did not then own a coal mine at said Coos Bay, and it was not then engaged in shipping coal into said city of Portland, and was not then operating a line of steamers between said Coos Bay and said city of Portland it was not then delivering daily to its yard in said city of Portland several hundred tons of coal, or any amount of coal whatsoever; and it did not then own one hundred thousand dollars worth of bonds of said Consolidated Coal Company of St. Louis, or any bonds whatsoever of said company; and did not then have on deposit with said The National Bank of Commerce at said city of Seattle, government bonds of the value of thirty-nine thousand dollars ($39,000.00), or any government bonds of any value whatsoever, and each and all of the pretenses and representations then and there so made by said William H. Garland to said Job L. Beardslee as aforesaid, were in all respects utterly false and untrue,—all of which he, said William H. Garland, then and there well knew;

Contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington.

GEORGE F. VANDERVEER,
Prosecuting Attorney.

STATE OF WASHINGTON,
County of King, ss:

A. G. McBride being first duly sworn on oath says that he is a deputy prosecuting attorney in and for the county of King, State of Washington; that he has read the foregoing information knows the contents thereof, and believes the same to be true.

A. F. McBRIDE.

5 Subscribed and sworn to before me this 15th day of November, 1910.

D. K. SICKELS, [SEAL.]
Clerk of the Superior Court of King County, State of Washington,
By G. A. GRANT, *Deputy.*

Witnesses for the State.

Chet Belding, Charles B. Woods, Job L. Beardslee, L. K. Church, M. M. Freeman, J. J. Crofut, Fred N. Kneeland, Robert E. Walker.
Filed Nov. 15, 1910.

D. K. SICKELS, *Clerk.*

6 In the Superior Court of the State of Washington for the County of King.

No. 5269.

STATE, Plaintiff,
vs.
WM. H. GARLAND, Defendant.

Præcipe for Transcript.

To D. K. Sickels, Clerk:

You will please prepare transcript in above case as follows:

(1) Second information filed Nov. 15, 1910.
(2) Motion directed to second information filed Dec. 13, 1910.
(3) Journal entry of Dec. 17, 1910, denying motions.
(4) Journal entry of arraignment and plea on second information, if any.
(5) The entire criminal appearance docket.
(7) This præcipe.
(8) Motion for change of venue filed Oct. 11, 1910.
(9) Journal order denying motion to change venue, made Oct. 13, 1910.
(10) Court's written instructions to jury filed Feb. 21, 1911.
(11) Defendant's requested instructions filed Feb. 21, 1911.

(12) Defendant's exceptions to instructions filed Feb. 25, 1911.
(13) Motion for new trial filed Feb. 21, 1911.
(14) Order denying motion for new trial made Feb. 25, 1911.
(15) Verdict returned Feb. 20, 1911.
(16) Notice of appeal filed Feb. 25, 1911.
Feeb. 25, Sentence.

O. L. WILLETT,
Att'y for Def't.

Filed Feb. 27, 1911.
D. K. SICKELS, *Clerk.*

7 Superior Court, State of Washington.

Criminal Appearance Docket, No. 5269.

Attorneys: George F. Vanderveer.
Title of Cause: State of Washington vs. William H. Garland.
Character of Action: Grand Larceny.

Dept. No. —.

Filed ——, —.

Date.	Pleadings and Journal Entries.	Jrl. Folio.
1910.		
M'ch 18.	Information—Warrant issued.	
" 16.	Issued Certified Copy of Information.	
" 26.	330/246 Ent'd—Arraignment. Court Grants Def'at 4	
" 26.	days in which to plead.	
" 29.	Motion to quash—Notice & Note for Motion Docket.	
Apr. 2.	Ent'd. Motion to quash. Denied—Defendant pleads Not Guilty.	
" 4.	Order denying Motion to quash.	
" 4.	Note & Notice for Motion Docket—Motion for Change of Venue.	
" 4.	Ent'd. Order denying Motion to quash, signed.	
" 6.	Affidavit—Affidavit of Wm. H. Garland—Affidavit of O. L. Willett.	
" 8.	Notice for Trial set—Aff't of B. J. Klene—Aff't of Thomas Ligon.	
" 9.	372/79 Bail bond (Box 4).	
" 9.	Ent'd. Court orders that the bond be reduced from	
" 9.	$5,000 to $4,000. The bond is accepted and prisoner	
" 9.	released on bail—Motions for change of venue cont'd	
" 9.	till Tuesday.	
" 16.	(2) Affidavit—Receipt.	
" 16.	Ent'd. D'f'ts Motion for Change of Venue denied.	
May 2.	Warrant & Sh'r'f Return.	
" 24.	Notice of Trial set.	
" 26.	Motion for Continuance—Order s'g'd & filed.	
June 20.	Præcipe for Subpœna Issued.	
" 27.	Ent'd. Order for Subpœna sig'd.	

" 27. 331/111 Ent'd Hearing—Def'a'ts Ex. 1—State's Ex. A.
" 27. Def'a'ts Challenges the sufficiency of the evidence and
" 27. moves for a dismissal motion denied—Def'a't- Ex-.
" 27. 2, 3, & 4. Cause cont'd to June 28, 1910.
" 28. Subpœna.
" 28. Ent'd. Hearing Def'a'ts Ex-. 5, 6, 7, Jury finds defend-
" 28. ant guilty as charged.
" 27. Præcipe for Subpœna issued. Præcipe for Subpœna.
" 27. Witness Time Sheet Def't- Ex-. 1, 2, 3, 4, filed—State's
Ex. A. filed.
" 28. 331/114 Verdict—Def't- Ex-. 5, 6, 7, filed—Instructions
to the Jury.
" 28. Requested by Def't. Instructions.
" 30. Motion for new Trial.
July 1. 331/127 Order extending time for filing Affidavits—
" 1. Except. of Def't to instruction to Jury.
" 1. Ent'd. Defendants Exceptions to Instructions allowed—
" 1. Order extending time to file affidavits signed.
" 5. 331/133 Order & Bill for Board or Lodg. of Jurors.
" 7. Cost Bill for June 1900.
Sept. 2. Order s'g'e- & filed.

(Cont'd to Page 305.)

8 (Con.).

Sept. 2. Filed Ent'd—Motion for new Trial granted.
Oct. 8. Notice of trial set (Oct. 20, 1910).
" 11. Motion for Continuance & Aff't—Motion for Change of
Venue & Aff't.
" 11. Notice & nate for Motion D'k't.
" 13. Ent'd. Motion for Change of Venue Denied.
" 20. Ent'd. Cause count'd to November 21, 1910.
Nov. 15. Second Information—Præcipe for Execution iss'd.
" 15. Motion for continuance & affidavit.
" 15. Notice & Note for motion docket.
" 16. Warrant & Sh'fs Return.
" 16. Ent'd. Cause Cont'd Dec. 22, 1910.
" 17. Præcipe for Subpœna (*used*).
" 22. Subpœna & Sh'f Return.
Dec. 13. Motion directed to second information. Notice & Note
" 13. for Motion Docket.
" 17. Ent'd. Motion to quash 2nd Information denied—Motion
" 17. to strike 2nd Information denied. Motion to strike
" 17. 2nd information more def. & cert. denied.
" 19. Subpœna & Sh'r'fs Return.

1911.

Jan. 3. 332/82. Order reducing bail, s'g'd & filed.
" 3. Ent'd. Deputy Pros. Att'y McBride in open court con-
" 3. sents that bail of D'fs't- may be reduced.
" 14. Ent'd. Cause set Feb. 20, 1911.
" 21. Notice of Trial Set 20 day of Feb. 1911.

Feb. 15. Ent'd. Subpœna issued.
" 15. Præcipe for subpœna iss'd.
" 18. Ent'd. Cause transf. to Dept. #5.
" 20. Ent'd. Hearing (in Dept. 5 from #1). Motion for dismissal denied. Def'ts Ex-. 1, 2 & 3—State Ex-. A, B, C, D, & E. Jury finds Def't guilty.
" 20. State's Ex-. A, B, C, D, E, filed—Def't Ex. 2 filed. Court
" 20. instructions to the jury. (2) Def't requested instructions—verdict.
" 20. Subpœna & Sh'f Return—Witness Time Sheet.
" 21. Notice & Note for Motion D.—Motion for New Trial.
" 21. Assignment of Witness Fees (10% p'd). Witness Time Sheet.
" 24. Aff't in Support of Motion for new Trial—Notice of Appeal.
" 25. Def't Exceptions to Instructions—Stipulations.
" 25. Ent'd. Motion for new trial denied.
" 25. Ent'd. Def't sentenced to Pen for not less than three
" 25. nor more than fifteen years. Def't gives notice of appeal in open court.
" 25. Notice of Appeal.

9 In the Superior Court of the State of Washington for King County.

No. 5269.

STATE OF WASHINGTON, Plaintiff,
v.
WILLIAM H. GARLAND, Defendant.

Motion Directed to Second Information.

Comes now the defendant and moves the court for an order quashing the second information herein, for the following reasons:

That the said second information does not state facts sufficient to constitute a crime, and the offense attempted to be stated herein is uncertain and not sufficiently set out.

If the court shall deny said motion to quash, then the defendant moves the court for an order striking from said second information the following:

* * * * * * *

V.

To strike that portion of the second paragraph reading: "a check payable for the sum of one thousand dollars in money," for the following reasons: That said allegation is incompetent, irrelevant and immaterial, it does not contain any identification of the said check, and is an attempt herein to predicate a criminal liability on an alleged amended information in which the cause for complaint is ma-

terially changed, and that there is no authority in law or order of this court permitting the filing of the second information, or the changing of the charge herein from a charge of obtaining $1,000.00 in cash, to a charge of obtaining a check.

* * * * * * *

The entire motion to strike is directed not only to the several portions set out, but to each and every part, portion and word thereof separately and collectively, and in all possible combinations and portions."

10 In the Superior Court of the State of Washington for King County.

No. 5269.

STATE OF WASHINGTON, Plaintiff,
vs.
WM. H. GARLAND, Defendant.

SATURDAY, *December* 17, 1910.

Hon. J. T. Ronald, Judge.

Motion to quash second information denied.
Motion to strike second information denied.
Motion to make second information more definite and certain denied.
Exceptions allowed.
Journal 332, Page 41.

11 In the Superior Court of the State of Washington in and for King County.

No. 5269.

THE STATE OF WASHINGTON, Plaintiff,
vs.
WILLIAM H. GARLAND, Defendant.

Testimony and Proceedings.

Be it remembered, that this cause came on regularly to be heard on this, the 20th day of February, 1911, before the Hon. Wilson R. Gay, one of the judges of the above entitled court, and the judge presiding over Department No. 5 thereof, sitting with a jury duly empaneled and sworn, the state being represented by Hugh M. Caldwell, Esq., Deputy Prosecuting attorney; and the defendant being represented by John Manning and O. L. Willett, Esqs., whereupon the following testimony was offered and proceedings had:

* * * * * * *

(Jury sworn to try cause.)

* * * * * * *

JOB L. BEARDSLEE, a witness called on behalf of the state being first duly sworn, testified as follows:

(By Mr. CALDWELL:)

Q. State your full name.
A. Job L. Beardslee.

Mr. WILLETT: For the purpose of the record in the case I want to object at this time to the introduction of any evidence whatsoever, on the ground that the state has no right to try the defendant on the information now before the court.

The COURT: Motion denied; exception allowed.

* * * * * * *

12 At the close of the testimony and before the argument by respective counsel, the court gave the jury the following

Instructions.

* * * * * * *

The COURT: The defendant herein is charged by the information in this case with the crime of grand larceny, committed as follows:

* * * * * * *

And said Job L. Beardslee, * * * did then and there deliver to said William H. Garland a check payable in the sum of one thousand dollars in money, * * *"

* * * * * * *

13 In the Superior Court of the State of Washington for King County.

#5269.

STATE
vs.
WM. H. GARLAND.

Exceptions of Defendant to Instructions.

Comes now the defendant and excepts to the instructions given and refused in this case on the second trial, as follows:

I.

Defendant excepts to instructions numbered I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, and XV, as given by the court to the jury herein, and to each and every one thereof, and to each and every part and portion thereof and further excepts to the oral instructions orally and to each and every part thereof.

O. L. WILLETT,
Att'y for Def't.

The above exceptions to the instructions as given and refused were presented and taken in open court, in presence of counsel for all parties, after due notice and before the hearing of the motion for a new trial herein.

Dated Feb. 25, 1911.

WILSON R. GAY, *Judge.*

Filed Feb. 25, 1911. D. K. Sickels, Clerk.

14 In the Superior Court of the State of Washington for the County of King.

No. 5269.

THE STATE OF WASHINGTON, Plaintiff,
vs.
WILLIAM H. GARLAND, Defendant.

Verdict.

We, the jury in the above entitled cause do find the defendant "Guilty."

E. M. BALDWIN, *Foreman.*

Filed Feb. 21, 1911. D. K. Sickels, Clerk.

15 In the Superior Court of the State of Washington for King County.

No. 5269.

STATE OF WASHINGTON, Plaintiff,
v.
WILLIAM H. GARLAND, Defendant.

Motion for New Trial.

Comes now the defendant, and moves the court for an order granting a new trial in the above entitled cause, for the following reasons:

I.

Irregularity in the proceedings of the court and the jury, and the plaintiff in the case, and that the orders of the court in the premises prevented the defendant from having a fair trial.

II.

Misconduct of the state and the jury.

III.

Accident and surprise which ordinary prudence could not have guarded against.

IV.

Insufficiency of the evidence to justify the verdict and that the verdict is against the law.

V.

Error in law occurring at the trial, and excepted to at the time by the defendant.

O. L. WILLETT AND
JOHN MANNING,
Attorneys for Defendant.

Receipt of a copy and due service hereof admitted this 21 day of Feby. 1911.

JOHN F. MURPHY,
Attorney for Pl'ff.
L. G.

Filed Feb. 21, 1911. D. K. Sickels, Clerk.

16 In the Superior Court of the State of Washington for the County of King, Department No. 5.

SATURDAY, *February 25th*, 1911.

Hon. Wilson R. Gay, Judge, Presiding.

5269.

STATE OF WASHINGTON
vs.
WILLIAM H. GARLAND.

John F. Murphy.
Willett & W.

Motion for new trial denied. Exceptions allowed.
Respective counsel being present and agree to taking up this motion.
Min. Book No. 5 Page 49.

17 Defendant was tried and convicted on a charge of grand larceny. He was arrested on February 25, 1910. The information charges the obtaining of a thousand dollars in cash. A trial was had in June, 1910, resulting in a conviction. A new trial was granted because of fatal variance, and other reasons. * * * The defendant, at the trial, objected to the introduction of any evidence on the ground that the state had no right to put him on trial on that information. (See page 5 of S. of F.)

The defendant was never arraigned on the second information, and he has never yet pleaded thereto. He objected to going to trial

as above set forth. (S. of F. p. 5.) Appellant's Brief, pp. 1, 2, and 3.

The objection then made raised four questions. First, that the defendant had not been arraigned. Appellant's Brief, p. 4.

Assignment of Errors. I. The court erred in denying the several motions directed against the information. II. The court erred in overruling the objection to the introduction of any evidence. * * * XIX. The court erred in denying the motion for a new trial. * * * pp. 32, 33, 35.

In other words, the first information charged the larceny of $1,000.00 in cash; the second information charged the larceny of a check. The second information was filed in the case in which the first information was filed. The first information was not dismissed, and no permission was produced from the court for the filing of a second information. * * * pp. 36, 37.

-II. That the court erred in overruling the objections to the introduction of evidence.

The record in this case affirmatively shows that there was no arraignment or plea. This is not a case where the court can say that, because the defendant was arraigned, he should have entered his plea; neither is it a case where the court can say that the defendant has pleaded, and therefore has waived arraignment. Because in this case, there was neither an arraignment nor a plea on the in-
18 formation on which the defendant was tried. * * * pp. 57, 58.

In the case at bar, the record affirmatively shows that there was no arraignment or plea on the second information; and there can be no claim that the arraignment or plea was waived in any manner. * * * p. 59.

The sixth amendment to the constitution of the United States provides that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation. The manner of informing the defendant is by arraigning him, and this is jurisdictional. A verdict of guilty in a criminal case is a nullity, unless there has been an arraignment and plea. Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 592, 40 L. Ed. 1907. * * * p. 60.

The authorities are very thoroughly examined in the opinion filed by Justice Harlan in Crain v. United States, 162 U. S. 625. In that case the supreme court of the United States held that the record must affirmatively show an arraignment and plea, and that to deprive a defendant of his liberty on a conviction in a criminal case, without such arraignment and plea, is the depriving of the defendant of his liberty without due process of law, within the inhibition of the constitution of the United States. p. 65.

The objection to the introduction of evidence should also have been sustained because the state had no right to file the second information. * * * The defendant had no means of knowing on which information he would be put to trial. There cannot be two informations in the same case, at the same time. Ruhe v. State, 15 Mich. 9; 21 Cyc. 275. * * * p. 72.

XVII. That the court erred in denying the motion for a new

trial. * * * We call particular attention to the fact that by this motion the trial judge was informed of the failure of the state to arraign the defendant. The lower court was given ample opportunity to correct the error. This is not a case in which the question is raised for the first time in this court. Appellant's Brief.

19 p. 131.

The objection of the appellant first urged against the information, that the state could not file a second information without first dismissing the first one, is, we believe, without merit. From the faces of the two informations they may charge entirely different acts. * * * p. 8.

Before the case came on for trial the said judge ceased to preside over the criminal department of the court, and A. G. McBride, who filed the second information, ceased to be a deputy in the prosecuting attorney's office. So that at the time of trial neither the Hon. Wilson R. Gay, before whom the case was tried, nor the prosecuting attorney's office had any knowledge whatever that appellant had not been arraigned upon the second information, or that he had not formally entered a plea. * * * p. 10.

It is not among the contentions, extravagent or otherwise, in appellant's brief, that he was prejudiced by the omission of the formality of having his attorney utter the words "not guilty" before the state introduced any evidence. * * * This court is not asked to sanction as a rule of procedure, the omission of the formal plea of "not guilty." Pp. 12, 13, Respondent's Brief.

20 The state has contented itself with a claim that where no plea is interposed, no harm is done. They have entirely ignored the fact that the defendant was never arraigned upon this second information which they admit on its face may charge an act entirely different from the first information. The failure to arraign is jurisdictional and is a right that cannot be waived by the attorney for the defendant. * * * pp. 3, 4.

The defendant was clearly deprived of liberty without due process of law within the language of the authority cited by the state. * * * P. 10.

Certainly it was not a trial according to the law of the land. P. 21, Appellant's Reply Brief.

The constitution of the United States says: "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (Fourteenth Amendment.) P. 1.

The supreme court of the United States has said in a case that has never been so much as modified that a conviction without an arraignment and plea is contrary to due process of law. In Crain vs. U. S., in 162 U. S., 625, the court said: * * * The supreme court of the United States in that case further held that the arraignment and plea are jurisdictional, that the arraignment and plea must affirmatively appear from the record, that these jurisdictional steps cannot be waived by the defendant, and that the omission is not cured by the defendant voluntarily going to trial without objection, knowing that there was no plea. * * * The supreme court

of the United States has said that the necessity for a plea is implied in the due process of law clause of the constitution of the United States and that decision, as an interpretation of the constitution of the United States, is binding upon this court. * * * The constitution of the United States is as much binding in the state of Washington as it is in the state of Arkansas in which state the Crain case originated and we submit that this court has no power to overrule the Supreme Court of the United States on a federal constitutional question. P. 3. (Petition for Rehearing.)

In the Superior Court of the State of Washington for King County.

No. 5269.

STATE OF WASHINGTON, Plaintiff,
vs.
WILLIAM H. GARLAND, Defendant.

Notice of Appeal.

To the State of Washington and to John F. Murphy, the prosecuting attorney of King County:

You and each of you will please take notice that the defendant in the above entitled cause, William H. Garland, does hereby appeal from the verdict of the jury in said cause rendered on February 20, 1911, finding the defendant guilty as charged, and from the order of the court made on February 25, 1911, denying the motion of the defendant for new trial, and from the judgment and sentence of the court rendered on said verdict on February 25, 1911; and from the order of the court made on April 16, 1910, denying the motion for change of venue herein; and from the order made on October 11, 1910, denying the further motion for change of venue; and from the order made on December 17, 1910, denying the motion of the defendant to quash the second information herein; and from the order made on December 17, 1910, denying the motion of the defendant to strike certain portions of the second information, as appears from the "motion directed to second information," as the same appears among the records and files in this case; and from the order denying the motion of the defendant to require plaintiff to make the second information more definite and certain in certain particulars, as appears from the above mentioned "motion directed to second information"; and from the order of the court overruling the objection of the defendant to the introduction of any testimony in this case on the second information without any arraignment of the defendant having been had or plea entered thereon; and the defendant appeals from each and every one of said orders and rulings, and from each and every order, ruling or proceeding in this case decided adversely to the defendant.

O. L. WILLETT AND
JOHN MANNING,
Attorneys for Defendant.

Receipt of a copy and due service hereof admitted this 25 day of Feb. 1911.

LOUIS T. SILVAIN,
Dep. Pros. Att'y.

Filed Feb. 25 1911. D. K. Sickels, Clerk.

24 Filed Nov. 18, 1911.

Department One.

No. 9624.

STATE OF WASHINGTON, Respondent,
vs.
WILLIAM H. GARLAND, Appellant.

The defendant was convicted of the crime of grand larceny. He appeals from a judgment pronounced upon the verdict of a jury.

It appears that this is the second trial of the case upon the same state of facts. The defendant was found guilty upon the first trial, but upon his motion the court granted a new trial. The reason for granting this motion does not appear from the record, but appellant states that the motion "was granted because of fatal variance and other reasons." Thereafter the prosecuting attorney filed another information as follows, omitting the formal parts:

"The said William H. Garland, in the county of King, state of Washington, on the 10th day of January, A. D. 1910, with intent to defraud, did fraudulently, falsely, designedly, unlawfully, and feloniously pretend and represent to one Job L. Beardslee that a certain corporation known as the Apex Coal Company of the city of Seattle, in said state of Washington, then and there owned a coal mine at Coos Bay in the state of Oregon; that said Apex Coal Company was then engaged in shipping coal into the city of Portland, in the state of Oregon, from Coos Bay, and was then operating a line of steamers between said Coos Bay and said city of Portland, and was then delivering daily to the yard of said corporation in said city of Portland several hundred tons of coal; that said corporation then owned one hundred thousand dollars worth of bonds in the Consolidated Coal Company of St. Louis, which bonds had never at any time been of any value less than the sum of one hundred and three dollars for each; and that said corporation then had on deposit with the National Bank of Commerce at said city of Seattle, government bonds of the value of thirty-nine thousand dollars, upon which said corporation could at any time realize the sum of thirty thousand dollars. And said Job L. Beardslee, then and there believing the false pretenses and representations so made by said William H. Garland and relying thereon, and being then and there deceived thereby, was then and there induced by reason thereof, and not otherwise, to deliver, and did then and there deliver to said William H. Garland a check payable for the sum of one thousand dollars in money, the

check, money and property of said Job L. Beardslee, in payment of ten shares of the stock of said corporation. And said William H. Garland did then and there fraudulently, unlawfully and feloniously receive and obtain said money by means of said false and fraudulent pretenses and representations, with intent then and there to defraud."

After this second information was filed, the defendant filed a motion to quash the same for the reason that it did not state facts sufficient to constitute a crime, and in case that this motion should be denied, then to strike out all the representations alleged to have been made, and in case that motion was denied then to make the information more definite and certain. These motions were denied and the defendant was placed upon trial. He objected to the introduction of any evidence, "on the ground that the state had no right to try the defendant on the information now before the court."

It is argued that these motions should have been sustained because the information was filed without an order dismissing the first one and without permission of the court, and also because the information does not charge an offense and is indefinite and uncertain. We shall briefly notice these questions. It does not appear that leave of the court was obtained to file the second information, or that the first one was quashed. The reason for filing the second information is apparent. The first alleged that Mr. Beardslee was induced by false and fraudulent representations to deliver to defendant "one thousand dollars ($1,000.00) in lawful money of the United States;" while the proof showed that Mr. Beardslee indorsed and delivered to defendant a certificate of deposit for $1,000. On account of this variance and "for other reasons," the new trial was granted. Thereupon this new information was filed, which differed from the first only in respect to the character of the property received. The second information, instead of alleging $1,000 in lawful money of the United States, alleged "check payable for the sum of $1,000 in money." This court has repeatedly held that a new information may be filed in such cases. In State v. Riley, 36 Wash. 441, we said:

"It is not error for a court to allow the information to be withdrawn, and another more perfect one be substituted in its stead. State v. Gile, 8 Wash. 12, 35 Pac. 417; State v. Hansen, 10 Wash. 235, 38 Pac. 1023; State v. Lytz, 25 Wash. 347, 65 Pac. 530. Nor was it error to do so after the court first had considered it and adjudged it sufficient."

In State v. Phillips, 23 Wash. Dec. 144, we held that this was not jurisdictional, and was waived where the information was not moved against on that ground. Although it does not appear that an order of court was made granting the permission to file a new information, we must assume that such permission was had, because the court treated the new information as filed and so considered it.

Appellant next argues that the information is fatally defective because it does not show for what purpose he made the representations, or that the stock of the Apex Coal Company was purchased

on account of such representations. He then asks twenty questions of the information, of which these are examples:

"(1) Whom did Garland intend to defraud?

(2) For what purpose were the representations made?

(3) In what capacity were the representations made to it, as individual or as an officer of the Apex Coal Company?

(4) For whose benefit were the representations made?"

and so on; and then proceeds to argue that the information does not answer these questions. These or similar questions do not, we think, test the sufficiency of the information. The test is fixed by the statute as follows:

"The * * * information must contain,—* * * A statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." Rem. & Bal. Code, § 2055.

There can be no doubt that, when the defendant read this information, he readily understood that he was charged with having unlawfully obtained a check for $1,000 from Mr. Beardslee by means of the false and fraudulent representations stated, and that he received the money thereon with intent to deprive and defraud the owner thereof. This was all that is necessary under the statute. We are satisfied that the information was sufficiently definite and certain as required by the code, and states an offense against the defendant.

State v. Bokien, 14 Wash. 403;
State v. Ryan, 34 Wash. 597.

It is argued that the information is bad, because there is no sufficient description of the check and no value thereof alleged. The information alleges that Mr. Beardslee "did then and there deliver to said William H. Garland a check payable for the sum of $1,000 in money * * * and said William H. Garland did then and there unlawfully * * * receive and obtain said money."

It is plain that the check here alleged was the check of Mr.
27 Beardslee, and that it was of the value of $1,000, for it was alleged that the defendant obtained the money. This was sufficient.

Appellant next argues that the court erred in overruling the objection to the introduction of evidence. This argument is based upon the fact that a plea of not guilty had not been entered by the defendant on the second information before the trial began, and also that the cause had not been brought to trial within sixty days after the information had been filed. There is no merit in either of these points, because the cause was tried and submitted to the jury upon the theory that a plea of not guilty had been entered, and no objections were made upon these grounds before trial. They were therefore waived.

State v. Straub, 16 Wash. 111;
State v. Quinn, 56 Wash. 295;
State v. Alexander, 23 Wash. Dec. 264.

It is next argued that the court erred in receiving oral evidence to the effect that the Apex Coal Company was not operating a line of steamers between Coos Bay and Portland, Oregon. This point is based upon the fact that the United States statutes required vessels engaged in domestic commerce to be registered, and it is argued that such records are the best evidence of the fact. It is apparent, however, that if the Apex Coal Company was not operating vessels, the records would not show that fact. Any one who might know the fact would be competent to testify thereto.

It is next argued that the Court erred in receiving in evidence the state's Exhibit A. This exhibit was offered to prove the check alleged in the information. It is as follows:

"Montesano State Bank, No. 16021. $1,000.

MONTESANO, WASH., *Oct.* 7, 1909.

J. L. Beardslee has deposited in this bank $1,000, payable to the order of self on the return of this certificate properly indorsed. Not subject to check.

W. H. FRANCE, *Cashier.*"

This instrument was indorsed upon back: "H. L. Beardslee. William H. Garland." These indorsements were followed by a stamped signature as follows:

"Pay Montesano State Bank, Montesano, Washington, or order (prior indorsements guaranteed). The National Bank of Commerce of Seattle, Washington."

28 Across the face of the check was the stamp of the Montesano State Bank as follows: "Paid January 12, 1910;" and also the perforated word "Paid." It is argued that this instrument is a certificate of deposit and not a check, and that it was therefore error for the court to receive it in evidence as proof of the check alleged. It is true that the instrument in its original form was a certificate of deposit, and is commonly known as such. It is stated upon the face of the check that the $1,000 so deposited was not subject to check, but it provided that the money would be paid upon the order of Beardslee upon the return of the certificate properly indorsed. It was indorsed by Beardslee and delivered to defendant. It thereby became payable to defendant, and was in legal effect and for practical purposes a check drawn by Beardslee upon the bank payable to defendant. Our statute defines a check as "A bill of exchange drawn on a bank, payable on demand." Rem. & Bal. Code, § 3575. "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer." Rem. & Bal. Code, § 3516. This certificate of deposit when it was indorsed by Beardslee answered all of these requirements and became in law, and was in fact, Beardslee's check on the bank to pay to the bearer $1,000. In State v. Hosher, 26 Wash. 643, where the defendant was accused of embezzling lawful money, we held that, where he obtained money upon a check drawn

upon a bank, there was no variance. We said: "The check was simply the instrumentality by which Hosher obtained the money from the bank." So in this case the mere form of the check was of no special importance. The important question was, did the certificate of deposit when indorsed by Beardslee become his check, and did defendant obtain the money upon it? This latter fact was apparently not disputed.

Other alleged errors are argued in the appellant's brief, but we think none of them are of sufficient merit to require notice. Some point is attempted to be made upon certain of the instructions given and refused by the court. No exceptions appear to have been
29 taken either to those given or to those refused. Under such circumstances the instructions will not be reviewed. It is sufficient to say that the instructions seem to be clear and free from error, and we are satisfied from the record that the defendant had a fair trial and that he is without doubt guilty of the crime charged.

The judgment is therefore affirmed.

MOUNT, *J.*

We concur:
DUNBAR, *C. J.*
PARKER, *J.*
FULLERTON, *J.*
GOSE, *J.*

30 Filed Nov. 28, 1911.

Department One.

No. 9624.

STATE OF WASHINGTON, Respondent,
v.
WILLIAM H. GARLAND, Appellant.

Per Curiam:

In the opinion in this case we said no exceptions appear to have been taken to the instructions given or refused. Exceptions appear to have been regularly taken. They were contained in the transcript but were overlooked by the writer of the opinion. A review of the instructions would not change the result. We make this correction in justice to appellant's counsel.

31 In the Supreme Court, State of Washington.

TUESDAY, *February* 6, 1912.

No. 9824.

STATE OF WASHINGTON, Respondent,
vs.
WILLIAM H. GARLAND, Appellant.

Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of King county and upon the argument of counsel and the court having fully considered the same and being fully advised in the premises, it is now on this 6th day of February, A. D. 1912, on motion of John F. Murphy, Esquire, of counsel for respondent, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs; the petition for rehearing denied; and that the said State of Washington have and recover of and from the said William H. Garland the cost of this action taxed and allowed at forty-seven & 25/100 Dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance herewith.

32 In the Supreme Court of the State of Washington.

WILLIAM H. GARLAND, Plaintiff in Error,
vs.
STATE OF WASHINGTON, Defendant in Error.

Petition for Writ of Error.

UNITED STATES OF AMERICA,
State of Washington:

To the Honorable R. O. Dunbar, Chief Justice of the Supreme Court of the State of Washington:—

This petitioner, William H. Garland, respectfully shows that on the 18th day of November, 1911, the supreme court of the state of Washington rendered a final judgment by the filing of a written opinion against your petitioner in a certain cause wherein the state of Washington was plaintiff and respondent and your petitioner was defendant and appellant, affirming the judgment of conviction of the superior court of the state of Washington for King county in the same case rendered on the verdict of the jury in said case, and by which said judgment said William H. Garland was sentenced to serve a term of not less than three nor more than fifteen years

in the penitentiary of the state of Washington; that on November 28, 1911, a further written decision of said supreme court was filed in the said cause, further confirming said decision of November 18, 1911, and that on February 5, 1912, a further written order was filed by said supreme court denying a petition for rehearing and confirming the decision of November 19, 1911, as will appear by reference to the record and proceedings in said cause, and that said supreme court is the highest court in said state in which a decision of said suit could be had; and your petitioner claims the right to remove said judgment to the supreme court of the United States by writ of error under Section 709 of the Revised Statutes of the United States because the said William H. Garland was held for trial in a cause then pending in said superior court on an information charging the larceny of one thousand dollars in cash; that thereafter, without notice to said William H. Garland, and
33 without leave of court having been obtained, and without lawful authority so to do, the prosecuting attorney of said King county filed a second information in the cause in which said William H. Garland was then held for trial and in which second information said William H. Garland was charged with the larceny of a check; that the said second information was never served upon William H. Garland; that he was never arraigned thereunder or pleaded thereto and that he was never called before the bar of said court to plead; that he entered no plea thereto and that none was demanded of him, but that nevertheless over his objection, William H. Garland was put on trial on the second information in the cause on which he was held for trial on the first information, and that without any election by the state of Washington on which information they would seek to convict said William H. Garland, and which said trial terminated in a verdict of guilty as charged in the second information, and a judgment and sentence pronounced thereon, all of which will appear by reference to the records and proceedings in said cause which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error returnable into the supreme court of the United States and for citation and supersedeas, and your petitioner will ever pray, etc.

WILLIAM H. GARLAND, *Petitioner.*
WILLETT & OLESON, *Attorneys for Petitioner.*

Indorsed: Filed Feb. 6, 1912: C. S. Reinhart, Clerk. F.

34 In the Supreme Court of the State of Washington.

WILLIAM H. GARLAND, Plaintiff in Error,
vs.
STATE OF WASHINGTON, Defendant in Error.

Assignment of Errors.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decisions and final judgment of the

supreme court of the state of Washington and the subsequent written opinions in the above entitled matter there is manifest error in this, towit:—

I.

That the supreme court of the state of Washington erred in confirming the judgment of the superior court of the State of Washington in and for King county, because it appeared by the record and the proceedings upon the trial and at all times on appeal, that neither the said superior court nor the supreme court of the state of Washington, at any time, ever had jurisdiction over the person of the plaintiff in error for the purpose of trying out the issues sought to be raised between the state of Washington and this plaintiff in error, in this, that the second information, being the information on which the plaintiff in error was tried in the superior court of the state of Washington for King county, was never served upon this plaintiff in error and that this plaintiff in error was never called to the bar to plead thereto and that this plaintiff in error was never arraigned on said second information, and it was never demanded of the plaintiff in error that he plead to said second information, and no plea was ever entered by the plaintiff in error or was entered for him to said second information, but that the superior court of the state of Washington for King county proceeded to try plaintiff in error over his objection without arraignment or plea, in violation of the Fourteenth Amendment to the Constitution of the United States.

II.

That the supreme court of the state of Washington erred
35 in confirming the judgment of the superior court of the state of Washington in and for King county, because it appeared by the record and proceedings at the trial and at all times on appeal, that plaintiff in error was arrested on an information filed in and warrant issued out of the superior court of the state of Washington for King county, and brought to trial on a charge of having obtained one thousand dollars in cash by false pretenses; that a trial was had on said information and a verdict of guilty rendered; that thereupon the verdict of the jury was set aside by the trial judge and a new trial ordered; that plaintiff in error has never been brought to trial again on said first information or pursuant to the order of the trial judge directing a new trial on said information, but that the prosecuting attorney of the state of Washington for King county unlawfully and without authority of law, and without any notice to the plaintiff in error and without leave of court ever having been first had or obtained, filed in the superior court of the state of Washington for King county and in the identical cause in which the first information was filed, a second information materially changing the charge against this plaintiff in error and charging this plaintiff in errer in said second information with the crime of obtaining a check by false pretenses; that the second information was never served upon the plaintiff in error and that he was

not arraigned thereon and no plea was ever demanded of him or ent-red by or for him, but that the said superior court of the state of Washington, in violation of the Fourteenth Amendment to the constitution of the United States, tried the said defendant on the charge set forth in said second information and without any election between the two said informations then pending against this plaintiff in error in said cause, and without any notice to this plaintiff in error that he would be brought to trial on said second information, and in which said trial a verdict of guilty was returned and a judgment rendered that the plaintiff in error be confined for a period of not less than three nor more than fifteen years in the penitentiary for the state of Washington, situated at Walla Walla; that the supreme court of the state of Washington has affirmed said judgment of the superior court of the state of Washington for
36 King county and that the constitutional question here set forth was raised in both the superior and supreme courts of the state of Washington.

Wherefore plaintiff in error prays (1) that the judgment of the supreme court of the state of Washington and the decision rendered by that court in this cause be reversed and (2) that judgment be entered by this court directing the supreme court of the state of Washington to reverse the cause of the defendant in error, the state of Washington, as tried in the said superior court against this plaintiff in error, William H. Garland, and direct the said superior court to set aside the verdict and judgment on the second information and dismiss the said action as to the second information; and (3) that in the event that this court should not grant so much of the prayer of this petition as requires a dismissal of said action on the second information by the superior court of the state of Washington, then that judgment be entered by this court directing the supreme court of the state of Washington to order the said superior court to set aside the verdict, judgment and conviction resulting from the trial on the second information and grant a new trial in said cause.

WILLETT & OLESON,
Attorneys for William H. Garland, Plaintiff in Error.

Indorsed: Filed Feb. 6, 1912. C. S. Reinhart, Clerk. F.

37 In the Supreme Court of the State of Washington.

WILLIAM H. GARLAND, Plaintiff in Error,
vs.
STATE OF WASHINGTON, Defendant in Error.

Order Allowing Writ of Error and Fixing Amount of Bond to Act as Supersedeas.

On reading the petition of William H. Garland, heretofore filed herein, and it appearing to the court that an assignment of errors has heretofore been filed herein with said petition for a writ of error, now, therefore,

It is ordered that a writ of error be allowed herein as prayed for by said William H. Garland, upon said William H. Garland furnishing a bond with good and sufficient surety conditioned as required by law in the sum of one thousand dollars ($1000.00), to operate as a supersedeas.

R. O. DUNBAR,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: Filed Feb. 6, 1912. C. S. Reinhart, Clerk. F.

38 In the Supreme Court of the United States.

WILLIAM H. GARLAND, Plaintiff in Error,
vs.
STATE OF WASHINGTON, Defendant in Error.

Bond.

Know all by these presents: That William H. Garland as principal, and the Pacific Coast Casualty Co., a bonding company organized under the laws of the state of California and authorized to do business in the state of Washington, as surety, are held and firmly bound unto the state of Washington, the defendant in error, in the just and full sum of one thousand & no/100 dollars ($1000.00) to be paid to the said defendant in error, the state of Washington, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, administrators, successors and assigned, jointly and severally firmly by these presents.

Sealed with our seal- and dated this the 6th day of February, 1912.

Whereas the above named plaintiff in error has prosecuted a writ of error in the supreme court of the United States to reverse the judgment rendered in an action entitled State of Washington, plaintiff and respondent, vs. William H. Garland, defendant and appellant, by the supreme court of the state of Washington;

Now, therefore, the condition of this obligation is such that if the above bounden plaintiff in error shall prosecute said writ of error to effect and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

[SEAL.] WILLIAM H. GARLAND, *Principal,*
PACIFIC COAST CASUALTY COMPANY.
By WALTER McKAY, *Attorney in Fact.*
By ——— ———, *Surety.*

39 The foregoing bond is hereby approved this sixth day of February, 1912.

R. O. DUNBAR,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: Filed Feb. 6, 1912. C. S. Reinhart, Clerk. F.

40 In the Supreme Court of the State of Washington.

WILLIAM H. GARLAND, Plaintiff in Error,
vs.
STATE OF WASHINGTON, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the State of Washington, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, District of Columbia, within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Washington wherein William H. Garland is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States of America, this 6th day of February, 1912.

R. O. DUNBAR,
Chief Justice of the Supreme Court
of the State of Washington.

Due and timely service of the above citation by copy, at Seattle, on the 8th day of February, 1912, is hereby acknowledged.

JOHN F. MURPHY,
Attorney for Defendant in Error,
The State of Washington.

41 [Endorsed:] 9624. In the Supreme Court of the State of Washington. William H. Garland, Plaintiff in Error, vs. State of Washington, Defendant in Error. Citation. Willett & Oleson, lawyers, Suite 431, Lyon Bldg., cor. 3rd Ave. and James St., Seattle, Wash. Filed Feb. 9, 1912. C. S. Reinhart, Clerk. F.

Copy of within citation received at Olympia, Wash., this 9th day of Feb., 1912.

W. V. TANNER, *Attorney General,*
J. T. S. TYLER, *Assistant Attorney General,*
Attorneys for M. E. Hay, Governor.
By F. M. DOLLAM, JR., *Sec.*

42 *Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable, the Chief Justice and the Judges of the Supreme Court of the State of Washington:

Because of the records and proceedings as also in the rendition of a judgment of a plea which is in the said Supreme Court of the State of Washington before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in a suit between the State of Washington, plaintiff and respondent, and William H. Garland, defendant and appellant, wherein was drawn in question the validity of a treaty or statute or of an authority exercised under the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said state upon the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of the treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or examination especially set up or claimed under such clause of such Constitution, treaty, statute or commission; a manifest error has happened to the great damage of William H. Garland as by his complaint and petition appears, and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and assignment of errors and all proceedings in said suit or cause, with all

43 things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same at Washington on the 6 day of April, 1912, in the Supreme Court to be then and there held, that the record and assignment of errors and proceedings aforesaid, being inspected, the said Supreme Court may cause to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States the 6th day of February, 1912.

[Seal of the United States District Court, Western District of Washington.]

A. W. ENGLE,
Clerk of the United States District Court
for the Western District of Washington,
By H. A. SIMPKINS,
Deputy Clerk.

Allowed by R. O. Dunbar, Chief Justice of the Supreme Court of the State of Washington.

Receipt of a copy and due service of the foregoing writ of error is hereby acknowledged this the 8th day of February, 1912.

JOHN F. MURPHY,
Prosecuting Att'y for King Co.
and Att'y for Respondent in Error.

44 [Endorsed:] 9624. In the Supreme Court of the United States. William H. Garland, Plaintiff in Error, vs. State of Washington, Defendant in Error. Writ of Error. Willett & Olerawvers, Suite 431, Lyon Bldg., cor. 3rd Ave. and James St., Seattle, Wash. Filed Feb. 9, 1912. C. S. Reinhart, Clerk. F.

Copy of within writ received at Olympia, Wash., this 9th day of Feb., 1912.

W. V. TANNER,
Attorney General;
J. T. S. TYLER,
Assistant Attorney General, Attorneys for M. E. Hay, Governor, by F. M. Dallam, Jr., Sec.

45 In the Supreme Court of the United States.

WILLIAM H. GARLAND, Plaintiff in Error,
vs.
STATE OF WASHINGTON, Defendant in Error.

Præcipe for Record to be Returned with Writ of Error in the Above Entitled Cause to the Supreme Court of the United States.

To the clerk of the Supreme Court of the State of Washington:

You will please prepare and transmit under your hand and the seal of the supreme court of the United States, together with the writ of error issued by the Hon. R. O. Dunbar, Chief Justice of the Supreme Court of the State of Washington on February 6, 1912, returnable to the Supreme Court of the United States, so that you have the same at Washington City on the 6th day of April, 1912, as your return to the said writ of error, a true copy of the assignment of errors, filed with the petition of the above named plaintiff in error for a writ of error, and a true copy of so much of the record in said cause in the supreme court of the state of Washington and of all of the proceedings in said cause, as is designated below, towit:

(1) Original information.
(2) Second information.
(3) Præcipe filed in the superior court for transcript.
(4) Criminal appearance docket.
(5) Motion directed to second information down to paragraph I, then all of paragraph V, and the following which follows paragraph VII:

"The entire motion to strike is directed not only to the several portions set out, but to each and every part, portion and word thereof,

separately and collectively and in all possible combinations and portions.

(8) Journal entry of December 17, 1910.

(7) From the statement of facts all of page 1; and from page 2 the following: "(Jury sworn to try cause)"; and from page 5 lines 9 to 17 inclusive; and from pages 82, 83 and 84, being a
46 portion of the instructions to the jury, the following: "At the close of the testimony, before the argument by respective counsel, the court gave the jury the following instructions,—"The court * * *. The defendant herein is charged by the information in this case with the crime of grand larceny, committed as follows: * * * and said Job L. Beardslee * * * did, then and there deliver to said William H. Garland a check payable in the sum of one thousand dollars in money."

(8) Exceptions of defendant and certificate of judge, except II.

(9) Verdict of the jury.

(10) Motion for new trial.

(11) Minute entry of February 29th (25?).

(12) The following from the brief of appellant:

(a) "Defendant was tried and convicted on a charge of grand larceny. He was arrested on February 25, 1910. The information charges the obtaining of a thousand dollars in cash. A trial was had in June, 1910, resulting in a conviction. A new trial was granted because of fatal variance, and other reasons. * * * The defendant, at the trial, objected to the introduction of any evidence on the ground that the state had no right to put him on trial on that information. (See page 5 of S. of F.)"

"The defendant was never arraigned on the second information, and he has never yet pleaded thereto. He objected to going to trial as above set forth (S. of F., p. 5.)" Pages 1, 2 and 3.

(b) "The objection then made raised four questions. First, that the defendant had not been arraigned." Page 4.

(c) Assignment of errors I, II, and XIX, pages 32 & 35.

(d) Last two lines on page 36 and all of page 37 down to and including the word "information" in the sixth line.

(e) Last four lines of page 57 and all of page 58 down to and including the word "tried" in line eight.

(f) "In the case at bar, the record affirmatively shows that there was no arraignment or plea on the second information; and there can be no claim that the arraignment or plea was waived in any manner." Page 59.

47 (g) All of page 60 after the word "Plea" in line 11.

(h) The entire paragraph appearing on page 65 immediately after the citation of authorities.

(i) And "The objection to the introduction of evidence should also have been sustained because the state had no right to file the second information. * * * The defendant had no means of knowing on which information he would be put to trial. There cannot be two informations in the same case, at the same time. Ruhe v. State, 15 Mich. 9; 21 Cyc. 275." Page 72.

(j) "XVII. That the court erred in denying the motion for

a new trial. * * * We call particular attention to the fact that by this motion the trial judge was informed of the failure of the state to arraign the defendant. The lower court was given ample opportunity to correct the error. This is not a case in which the question is raised for the first time in this court." Page 131.

(13) The following from the brief of respondent:

(*a*) "The objection of the appellant first urged against the information, that the state could not file a second information without first dismissing the first one, is, we believe, without merit. From the facts of the two informations they may charge entirely different acts." Page 8.

(*b*) That part of page 10 commencing with the word "before" in line 10 and ending with the word "plea" in line 20.

(*c*) "It is not among the contentions, extravagant or otherwise, in appellant's brief, that he was prejudiced by the omission of the formality of having his attorney utter the words 'not guilty' before the state introduced any evidence. * * * This court is not asked to sanction as a rule of procedure, the omission of the formal plea of 'not guilty.'" Pages 12 and 13.

(14) And from reply brief:

(*a*) The last six lines of page 3 and the first three lines of page 4.

(*b*) "The defendant was clearly deprived of liberty without due process of law within the language of the authority cited by the state." Page 10.

48 (*c*) "Certainly it was not a trial according to the law of the land." Page 21.

(15) And from the petition the following:

(*a*) That part of subdivision I from lines 8 to 16 inclusive of page 1.

(*b*) "The supreme court of the United States in that case further held that the arraignment and plea are jurisdictional, that the arraignment and plea must affirmatively appear from the record, that these jurisdictional steps cannot be waived by the defendant, and that the omission is not cured by the defendant voluntarily going to trial without objection, knowing that there was no plea. * * * The supreme court of the United States has said that the necessity for a plea is implied in the due process of law clause of the constitution of the United States and that decision, as an interpretation of the constitution of the United States, is binding upon this court." Page 2.

(*c*) "The constitution of the United States is as much binding in the state of Washington as it is in the state of Arkansas in which state the Crain case originated and we submit that this court has no power to overrule the supreme court of the United States on a Federal Constitutional question." Page 3.

(16) Notice of appeal from judgment of superior court and proof of service of same.

(17) Opinion of the Supreme Court of the State of Washington filed in this case on November 18, 1911.

(18) Opinion of the Supreme Court of the State of Washington filed in this cause on November 28, 1911.

(19) Written entry of supreme court of the state of Washington denying petition for rehearing made February 5, (6?) 1912.
(20) Petition of William H. Garland for writ of error.
(21) Assignment of errors by William H. Garland filed with his petition for writ of error.
(22) Order by Hon. R. O. Dunbar, Chief Justice of the Supreme Court of the State of Washington, allowing writ of error and fixing amount of bond to act as supersedeas.
(23) Copy of this præcipe.

WILLETT & OLESON,
Attorneys for William H. Garland.

Indorsed: Filed Feb. 27, 1912. Fred S. Genfob, Clerk.

49 In the Supreme Court of the United States.

No. —.

WILLIAM H. GARLAND, Plaintiff in Error,
vs.
STATE OF WASHINGTON, Defendant in Error.

Supplemental Præcipe.

To the Clerk of the Supreme Court of the State of Washington:

In addition to the items covered in the præcipe of this case. you will include in the record the following:
(1) Acceptance of service of præcipe.
(2) This supplemental præcipe.

WILLETT & OLESON,
Attorneys for Plaintiff in Error.

Indorsed: Filed Mar. 15, 1912. C. S. Reinhart, Clerk.

50 In the Supreme Court of the United States

WILLIAM H. GARLAND, Plaintiff in Error,
vs.
STATE OF WASHINGTON, Defendant in Error.

Acceptance of Service of Præcipe.

The undersigned as attorney for the state of Washington in the above entitled cause hereby acknowledges receipt of a copy and due service of the præcipe for record to be returned with writ of error in the above entitled cause to the supreme court of the United States.

Dated at Seattle, Washington, March 8, 1912.

JOHN F. MURPHY,
Attorney for Defendant in Error.

51 In the Supreme Court of the State of Washington.

No. 9624.

STATE OF WASHINGTON, Respondent,
vs.
WILLIAM H. GARLAND, Appellant.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing constitutes a full, true and correct copy of so much of the record in the above entitled cause as I have been directed by the plaintiff in error by the præcipe a copy of which is made a part of said transcript, to transmit to the Supreme Court of the United States.

And in pursuance of the writ of error heretofore filed, I now transmit said record, together with the original Writ of Error and the original Citation herein to said Supreme Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court of the State of Washington at Olympia this 25th day of March, 1912.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Endorsed on cover: File No. 23,147. Washington Supreme Court. Term No. 226. William H. Garland, plaintiff in error, vs. The State of Washington. Filed April 6th, 1912. File No. 23,147.

THE BOOK

IN THE

Supreme Court

OF THE

United States

October Term, 1913

WILLIAM H. GARLAND,
Plaintiff in Error,

vs.

STATE OF WASHINGTON,
Defendant in Error.

No.

Writ of Error to the Supreme Court of the State of Washington

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

This cause is here on a writ of error directed to the Supreme Court of the State of Washington. The plaintiff in error, William H. Garland, was informed against in the Superior Court of the State of Wash-

ington for King County. The information charged him with the larceny of *"One Thousand Dollars* $(1,000) *lawful money of the United States"* (R. p. 1). On this information he was arraigned and a plea of not guilty entered. (R. p. 5). He was then tried on that information and convicted. (R. p. 6). No new trial was ever had on this information. (R. pp. 6, 9 and 15). After the new trial was ordered, the prosecuting attorney for King County filed in the same case what he labeled a "Second Information." (R. pp. 3, 6 and 15). No application was made to the court for leave to file this "Second Information" and plaintiff in error never consented thereto. (R. pp. 6, 7 and 8). In fact, the filing of this "Second Information" was an *ex parte proceeding* on the part of the prosecuting attorney, not sanctioned by the court in any way. The first information was not quashed or dismissed and no election was ever made between the two informations that were on file in the same case. (R. pp. 6 and 7). The "Second Information" did not purport to be in any sense an amended information or a substitute for the original information. (R. pp. 1 to 7 inclusive). The "Second Information" charged the plaintiff in error with the larceny of *"a check payable in the sum of One Thousand Dollars* ($1,000) *in money."* (R. p. 3). There were then two informations on file in the same case against this plaintiff in error,

one charging him with the larceny of money and the other charging him with the larceny of a check. (R. pp. 1, 3, 5, 6 and 15). This "Second Information" was never served upon nor delivered to the plaintiff in error. After filing, a copy of of it was delivered to the attorney who represented the plaintiff in error on the first information. The plaintiff in error was never arraigned on the "Second Information" and he was never called upon to plead and never did plead thereto. (R. pp. 6, 7, 11, 12, 13 and 17).

The case was called for trial again pursuant to the order directing the new trial on the first information. After the jury had been impaneled, the prosecuting attorney indicated in his opening statement to the jury that the plaintiff in error was to be tried on the "Second Information." Thereupon, plaintiff in error objected to the introduction of any evidence on the ground that the state had no right to try the plaintiff in error on the information then before the court, to-wit, the "Second Information." The objection was overruled and exception noted. (R. p. 9). The jury returned a verdict of guilty, (R. p. 10), and the court sentenced the plaintiff on the "Second Information" and the verdict of guilty thereon, to a term in prison. (R. pp. 9 and 7). A motion for a new trial was made and denied. (R. pp. 10, 11 and 7). Thereupon, the plaintiff in error appealed to the

Supreme Court of the State of Washington. (R. p. 7). On the appeal, plaintiff in error contended that under the above recited facts he had been deprived of liberty without due process of law within the inhibition of the Constitution of the United States. (R. 11, 12, 13, 14, 16 and 17). He both cited and quoted from *Crain v. U. S.*, 162 U. S. 625, to this very point. (R. p. 12). The Supreme Court of the State of Washington held that "The cause was tried and submitted to the jury upon the theory that a plea of not guilty had been entered and no objections were made upon these grounds before trial, and were therefore waived." (R. p. 17). This ruling was based upon three prior decisions by the Supreme Court of the State of Washington, the first of which was the case of *State v. Straub*, 16 Wash. 111. (R. p. 17). The two later decisions are based on the *Straub* case. The *Straub* case was decided by the Supreme Court of the State of Washington on December 8, 1896, as the reports show. The case of *Crain v. U. S.* was decided by this court on April 20, 1896. The Supreme Court of Washington having in the *Straub* case failed to follow the interpretation of the Constitution of the United States, as laid down by this court, has consistently from that time refused to make its ruling correspond to the ruling of this court on the federal constitutional question involved. No mention was made by the Supreme Court of the State of Washington, in their opinion in the in-

stant case, of the failure to arraign the plaintiff in error on this "Second Information," although the court, in their opinion, do refer to the failure to have the defendant plead. (R. p. 17). The record before this court, however, contains the entire criminal appearance docket kept by the clerk of the Superior Court of the State of Washington for King County, (R. pp. 6 and 7), and that docket affirmatively shows that the plaintiff in error was never arraigned on this "Second Information." Moreover, the direct allegation was made in the brief submitted to the Supreme Court of the State of Washington by the plaintiff in error that there had been no arraignment on this "Second Information" and that the defendant had never pleaded thereto. (R. p. 11). This was admitted to be a fact by the State of Washington in its brief filed with the Supreme Court of the State of Washington; and it is here an admitted fact that there never was an arraignment on or plea to this "Second Information."(R. p. 13). At the very beginning of the second trial, the plaintiff in error objected to the introduction of any evidence, (R. p. 9), and the overruling of that objection was assigned as error in the opening brief of the plaintiff in error filed in the Supreme Court of the State of Washington; and under that assignment, the attention of the court was specifically called to the fact that there had been no arraignment on or plea to the "Second Information" and that

a judgment of imprisonment based on a trial had without an arraignment and plea was not based on due process of law. (R. p. 12). These same facts and the contention of the plaintiff in error, that under such a state of facts he had been deprived of liberty without due process of law and had not had a trial according to the law of the land, were again called to the attention of the Supreme Court of the State of Washington in the reply brief. (R. p. 13). Moreover, the point was considered and decided adversely to the plaintiff in error by the Supreme Court of the State of Washington. (R. p. 17). The same state of facts and point were again called to the attention of the Supreme Court of the State of Washington in the petition for a re-hearing, were again considered, and decided adversely to the plaintiff in error here. (R. p. 20).

SPECIFICATIONS OF ERROR.

I.

The Supreme Court of the State of Washington erred in confirming the judgment of the Superior Court of the State of Washington for King County because it appeared from the record that neither the said Superior Court nor the Supreme Court of the State of Washington, at any time, ever had jurisdiction over the person of the plaintiff in error

for the purpose of trying out the issues sought to be raised by the "Second Information" in this, that the "Second Information," being the information on which the plaintiff in error was tried, was never served upon the plaintiff in error, and the plaintiff in error was never arraigned thereon, and was never called to the bar to plead thereto; and it was never demanded of the plaintiff in error that he plead to the said "Second Information" and no plea was ever entered by or for him to said "Second Information," but the said Superior Court proceeded to try the plaintiff in error, over his objections, without arraignment or plea, in violation of the 14th amendment of the Constitution of the United States.

II.

The Supreme Court of the State of Washington erred in confirming the judgment of the Superior Court of the State of Washington for King County because it appeared from the record that the plaintiff in error was arrested on an information filed in and warrant issued out of the said Superior Court, and brought to trial on the charge of having obtained $1,000.00 in cash by false pretenses, that a trial was had on said information and a verdict of guilty rendered, that thereupon this verdict was set aside and a new trial ordered, that the plaintiff in error was never brought to trial again on said

first information or pursuant to the order of the trial judge directing a new trial, but the prosecuting attorney of the State of Washington for King County, without authority of law and without any prior notice to the plaintiff in error and without leave of court ever having been first had or obtained and without having first quashed or dismissed the first information filed in the said Superior Court, and in the identical cause in which the first information was filed, a "Second Information," charging the plaintiff in error with the crime of obtaining a check by false pretenses; that the second information was never served upon the plaintiff in error and he was not arraigned thereon and no plea was ever demanded of him or entered by or for him thereon; but the said Superior Court in violation of the fourteenth amendment to the Constitution of the United States, tried the plaintiff in error on the charge set forth in said "Second Information" and without any election between the two said informations then pending against this plaintiff in error in said cause and without any prior notice to this plaintiff in error that he would be brought to trial on said "Second Information," and on which trial a verdict of guilty was returned and a judgment rendered that the plaintiff in error be confined in the penitentiary for a period of not less than three nor more than fifteen years.

ARGUMENT.

Plaintiff in error claims that the fourteenth amendment to the U. S. Constitution was violated, *first*, in trying, convicting, and sentencing him on an information on which he had never been arraigned and to which he had never pleaded, and *second*, in trying, convicting and sentencing him on this "Second Information," no prior election between the pending informations or disposition of the first information having been made. We shall divide our argument into two subdivisions based upon these two contentions.

1.

That it was not due process of law to try, convict and sentence plaintiff in error on an information on which he had never been arraigned and to which he had never pleaded.

The law on this point has been settled by the ruling of this court announced in *Crain v. U. S.*, 162 U. S. 625, 40 L. Ed. 1097. In that case the record did not show that the accused was ever formally arraigned or that he had pleaded to the indictment, unless that could be inferred from an order

made at the beginning of the trial reciting that the jury was selected, impaneled and sworn "to try the issue joined." The Government there claimed that the defendant had, as a matter of fact, pleaded not guilty and that the omission to record the plea was only a clerical error. Certain of the Justices dissented from the judgment of the court on the ground that it could fairly be inferred from the record that an arraignment was had and plea taken; but there seems to have been no dispute that if, as a matter of fact, there had been no arraignment or plea and an objection to going to trial had been made, then the due process of law clause had been violated. The instant case is much stronger in its facts than was the *Crain* case, and in the record now before the court, it affirmatively appears and stands conceded by the brief of the State of Washington filed in the Supreme Court of the State of Washington, that no arraignment was had or plea taken. In the *Crain* case, this court examined the authorities at length and you there held that the rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead or that he did so plead is a matter of substance and not form, that an arraignment and plea is jurisdictional and cannot be waived by the defendant, and that due process of law requires that the accused plead or be ordered to plead, or that, in a proper case, a plea of not guilty be filed

for him before his trial can rightfully proceed. No good purpose would be served by attempting to analyze or cite additional cases. It is the settled law of the United States, as announced in the *Crain* case, that the conviction and sentence thereon of a person for an infamous crime is without due process of law, unless it appears affirmatively from the record that every step necessary to the validity of the sentence has been taken, and that an arraignment and plea are steps necessary and without which the proceeding is within the due process of law inhibition of the Constitution of the United States.

It is true that in the *Crain* case the prosecution had been commenced in the Federal Court and, therefore, the ruling of the *Crain* case is based on the due process of law clause of the fifth rather than the fourteenth amendment; but it has been decided by this court that the due process of law clause of the fourteenth amendment places the same inhibition on the states as does the fifth amendment on the Federal Government.

Hibben v. Smith, 191 U. S. 310, 48 L. Ed. 195.

The brief filed by the plaintiff in error with the Supreme Court of Washington incorrectly refers to the sixth amendment to the Constitution of the United States as being the amendment controlling

on the State of Washington. The record, however, shows that all of the facts on which this question is predicated were before the Supreme Court of the State of Washington, and that in the brief of the plaintiff in error these facts were detailed. (R. 11 and 12). The brief further contained an argument "that to deprive the defendant of his liberty on a conviction in a criminal case, without such arraignment and plea, is the depriving of the defendant of his liberty without due process of law within the inhibition of the Constitution of the United States." (R. 12). The plaintiff in error further argued in his reply brief: "Failure to arraign is jurisdictional and is a right that cannot be waived by the attorney for the defendant * * *. The defendant was clearly deprived of liberty without due process of law * * *. Certainly it was not a trial according to the law of the land." (R. p. 13). The term "law of the land" is synonymous with the term "due process of law."

Missouri Pacific R. R. Co. v. Himes, 115 U. S. 512, 29 L. Ed. 463.

In addition to all this, the Supreme Court of Washington actually passed upon the point raised. (R. p. 17).

2.

It was neither due process of law nor the giving to the plaintiff in error of the

equal protection of the law to file two informations against him in the same case charging substantially different crimes and put him on trial without any notice to him as to which charge he would be required to meet; and then sentence him on a general verdict of "Guilty."

The Statute of the State of Washington, Sec. 75 Remington & Ballinger's Code, provides what books are to be kept by the county clerk, who is *ex officio* clerk of the Superior court. The applicable parts of this section read:

> "1. He shall, at the expense of the county, provide and keep a book, in which he shall enter all appearances and the time of filing all pleadings in any case pending in said court; 2. He shall also keep a docket in which he shall enter, before every session, the titles to all causes pending before said court at such session, in the order in which they were commenced, beginning with criminal cases, noting in separate columns the names of the attorneys, character of the action, the pleadings upon which it stands at the commencement of the session, leaving a margin beside each case for the court to enter a short minute of the orders of the session. One copy of this docket he shall furnish for the use

of the court, another for the use of the members of the bar; * * *; 4. He shall also provide and keep a well-bound book, to be called the order book or journal, in which he shall record the daily proceedings of the court, and enter all verdicts, orders, judgments, and decisions thereof, * * *; 5. He shall also provide and keep well-bound books, one for an execution docket, one for a book of levies, and one for a final record, in which he shall make a full and perfect record of all criminal cases in which a final judgment is rendered, * * *."

The praecipe for a transcript that was filed with the clerk of the Superior Court specifically directs the clerk to send up; "(4) Journal entry of arraignment and plea on second information, if any. (5) The entire criminal appearance docket." (R. p. 4). You will find from the record that all of these entries were sent up and they are now befor this court. (R. pp. 5 to 7). This record shows that all of the minutes of the case and all journal entries are now before this court and the same does not contain any record of any kind or character of any arraignment or plea on the "Second Information," or of any disposition made by the court or the prosecuting attorney of the first information. It shows that the defendant was tried

and convicted on the first information; that he filed a motion for a new trial at a time when there was only one pending information; that thereafter a "Second Information" was filed without leave either of court or of the plaintiff in error here; that the first information was never quashed, amended, dismissed or disposed of in any manner and that there was never any election between the two informations or any notice of any kind given to the plaintiff in error here on which information he would be put on trial. (R. pp. 6 and 7). *The record further affirmatively shows that as a matter of fact he was put on trial and the court instructed the jury upon the "Second Information."* (R. p. 9). The jury found the defendant "Guilty," but there is absolutely no way of telling whether the jury found the defendant guilty of stealing $1,000 in cash or of stealing a check, except from the fact that the record shows that the court charged the jury; "The defendant herein is charged by the information in this case with the crime of grand larceny, committed as follows * * *; and said Job L. Beardslee, * * * did then and there deliver to said William H. Garland a check payable in the sum of $1,000 in money." We contend that the plaintiff in error was deprived of his liberty without due process of law and has been deprived of the equal protection of the laws in this that there were two informations in the same case charging him with substantially different crimes, the

second of which was absolutely unauthorized but on which the plaintiff in error was placed on trial without any election between the informations, or disposition of the first information, and the verdict of the jury does not show on which of the informations he was found guilty.

There cannot legally be two informations in the same case at the same time.

22 Cyc. 275 and 276.

Rice v. State, 15 Mich. 9.

We are unable to find any case in which this court has ever passed on the exact points raised. Referring, however, to the plaintiff in error in *Hopt v. Utah,* 110 U. S. 574, 28 L. Ed. 262, this court said:

> "The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or vacated by the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods."

The case at bar is much stronger because the plaintiff in error here did object to these unauthorized methods. (R. pp. 7, 8 and 9). And again in holding an indictment bad in *U. S. v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588, this court said:

> "A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances. It is a crime to steal goods and chattels, but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. * * *. Therefore, the indictment should state the particulars, informing the court as well as the accused."

If a single indictment or information in a given case can be bad for these reasons, what can be said where there are two separate and independent informations in the same case at the same time charging the larceny of entirely different articles? We are not, of course, contending to this court that the question whether or not a given information is sufficient under the laws of a state presents any federal constitutional question; but we

do say that the Constitution of the United States guarantees to every man the equal protection of the laws and prohibits the states from depriving a person of this equal protection or of his liberty without due process of law, and that a course of procedure that absolutely fails to notify a person on trial for a crime of the charge that he must meet and that leaves the verdict of the jury so uncertain as to make it a matter of speculation as to the charge on which he is found guilty, is within the inhibition of the federal constitution. How could the plaintiff in error in this case know whether he should be prepared to meet a charge of stealing money or of stealing a check? At the time of the trial, the plaintiff was charged in the same case by independent informations with stealing these two different species of property. The jury found him "Guilty." Which, according to the jury's verdict, did he steal?

That this cause should be reversed with instructions to grant a new trial, (*Crain v. U. S.*, 162 U. S. 625), and with instructions to require the state either to dismiss one of the informations or file an election between them, is respectfully submitted.

WILLIAM H. GORHAM,
O. L. WILLETT,
FRANK OLESON,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court

OF THE

United States

WILLIAM H. GARLAND,
Plaintiff in Error,

vs.

STATE OF WASHINGTON,
Defendant in Error.

NO. 226

Writ of Error to the Supreme Court of the State of Washington

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF THE CASE.

The plaintiff in error William H. Garland, was charged by information with the crime of Grand Larceny, said information was filed in the Superior Court of the State of Washington for King County,

on the 18th day of March, 1910. Thereafter on the 26th day of March, 1910, he was arraigned, and on April 2, 1910, plead not guilty to the charge. (R. p. 5).

Such information is fully set out on page one (1) of the record.

The cause came on for trial on the 28th day of June, 1910, and resulted in a verdict of guilty as charged. On the 2nd day of September, 1910, on motion of plaintiff in error, the trial court granted a new trial on the ground of a variance between the charge and the proof, the information charging the larceny of money, whereas the proof showed the larceny of a check. (R. pp. 16 and 28). On November 15, 1910, a second information was filed in the cause which information is set out on page 2 of the transcript of the record, and conforms to the proof at the first trial of the cause. After the filing of said second information in the cause, a copy thereof was served upon the attorney for the plaintiff in error. (Brief of plaintiff in error, p. 3). Thereafter on December 13, 1910, plaintiff in error filed a motion to quash said second information, a motion to strike same, and a motion to make same more definite and certain. Said motions were argued by plaintiff on December 17, 1910 and denied by the court (R. p. 6). Subsequently the case came to trial on said second information on the 2nd day of February, 1911. A jury was sworn and em-

paneled and the first witness called for the state, and his examination began. Plaintiff in error thereupon interposed the following objection.

Mr. Willett: For the purpose of the record in the case, I want to object at this time to the introduction of any evidence whatsoever, on the ground that the state has no right to try the defendant on the information before the court. (R. p. 9).

No reason other than as stated in the foregoing objection was given as grounds for objection, and the objection was overruled by the court.

Subsequent to the filing of the second information the judge who presided at the first trial ceased to preside over the criminal department of the court, and A. G. McBride, who filed the second information ceased to be a deputy in the office of the prosecuting attorney (R. p. 13).

The trial proceeded and resulted in a verdict of guilty as charged. Motion for a new trial was made and denied, and plaintiff in error sentenced to serve a term of not less than three nor more than fiftten years in the state penitentiary. (R. p. 7).

From said judgment an appeal was perfected by the plaintiff in error to the Supreme Court of the State of Washington in which said court the judgment was affirmed. (R. p. 20).

The case comes to this court on a writ of error to the Supreme Cour of the State of Washington.

ARGUMENT.

Plaintiff in error assigns two alleged errors as ground for the reversal of the judgment aforesaid. However, it appears that they both cover the same ground with the exception that as part of the second assignment, he claims that the State of Washington should have been required to elect upon which information as shown by the record the plaintiff in error would be tried.

I.

As has been heretofore stated the plaintiff herein was first tried upon an information charging the obtaining of the sum of one thousand ($1,000) dollars, lawful money of the United tSates by false representations.

He was found guilty thereof by a jury, but the trial court granted a new trial on the ground of a variance; the proof establishing that said plaintiff obtained a check for one thousand ($1000) dollars in the first instance, instead of actual money. Thereupon a second information was filed in the same case charging the larceny of such check instead of money, to conform to the proof, which would be the same as in the first trial, upon the re-trial of the case. Such information was filed on the 15th

day of November, 1910, a copy of which was delivered to the attorney for plaintiff in error. That such attorney was fully advised of the second information, and that he was fully aware of the abandonment of the first, is evidenced by the fact that on the 13th day of December, 1910, he directed several motions to the second information, all of which were argued and denied on the 17th day of December, in none of which did he allude to the lack of arraingnment, and the further fact that he was quite cognizant that the reason for the granting of a new trial was the variance which precluded a retrial on the first information. Further he appears again on January 3rd, and secures a reduction of plaintiff's in error bail. Between this time and the date of trial February 20, 1911, A. G. McBride, who had represented the state, in all of the proceedings in the case, ceased to be a deputy in the prosecuting attorney's office, and the trial of the case devolved upon another deputy who had no knowledge of the evolution of the case other than that it was regularly on for trial. Nor was the case tried before the same trial judge who presided at the first trial of the case. (R. p. 13).

Section 2098 Remington & Ballinger's Code of the State of Washington provides as follows:

> "*In answer to the arraignment the defendant may move to set aside the indictment or information,* or he may demur or plead to it and

is entitled to one day after arraignment in which to answer thereto if he demands it."

Section 2102 Remington & Ballinger's Code aforesaid further provides as follows:

> "If the motion to set aside the indictment or information be denied, the defendant *must immediately* answer the indictment or information, either by demurring or pleading thereto."

If, as is contended by plaintiff in error, there was not arraignment or plea, that fact was at all stages of the proceeding exclusively within his own knowledge, and if he felt that he was prejudiced thereby, an intimation of such nature from him at any time would have secured a correction of the irregularity. But he was conscious of no such prejudice. On the contrary instead of demanding that he be arraigned if he were in fact not arraigned, he answers the information in compliance with Section 2098 *supra* by moving to quash same, by a motion to strike certain portions thereof, and by a motion to make same more definite and certain. He thereby submitted himself to the jurisdiction of the court by assuming to answer arraignment in the manner required by the statute and if there was in fact no formal arraignment his action towards the second information indicated conclusively that he was fully aware of the charge against him, that he had been accorded all of the advantages secured

to him thereby, and that he waived such formality. For did he move to strike the following:

> "a check payable for the sum of one thousand ($1000) dollars,"

the only portion of the second information that was different from the first? The purpose of arraignment is to inform the accused what the charge against him is, and to obtain his answer thereto.

United States vs. McKnight, 112 Fed. 982.

And if the circumstances afford him all that he could secure by a formal arraignment, and he stands by without objection, without request for a privilege that he could have for the asking, he should be deemed to have waived same where it appears that he is fully informed as to the charge against him, and is not otherwise prejudiced in the trial of the case by the omission of that formaility.

Section 2102 Remington & Ballinger's *supra* requires the accused immediately upon the denial of motions directed to the information to answer same by plea or demurrer. The motions interposed by plaintiff were denied upon the 17th day of December, 1910, and it thereupon became his duty immediately to plea to the charge. If for any reason he failed to do so it became the duty of the court to enter a plea of not guilty.

Section 2115 Remington & Ballinger's Code as follows:

> "If the defendant fail or refuse to answer the indictment or information by demurrer or plea, a plea of not guilty must be entered by the court."

Hence plaintiff having taken advantage of such dilatory pleas in answer to arraignment as he saw fit, and failing to immediately plead to the information after the denial of such motions was accorded the benefit of the most favorable plea that could have been entered by him by the trial of the case as though he had in fact plead not guilty.

The information was in due form, the jury was called and sworn, plaintiff was present in person, and by his attorneys, witnesses were called and examined both for the state and the plaintiff in error, he knew perfectly well what the information charged him with and was allowed to make his defense just as fully and effectively as if a plea of not guilty had been made.

It is true that after the first witness had been called for the state in the trial of the case, that the plaintiff in error interposed the following:

"For the purpose of the record in the case, I want to object at this time to the introduction of any evidence whatsoever, on the ground that the state has no right to try the defendant on the information now before the court."

In making such objection, counsel for plaintiff in error studiously avoided any reference to the omission to formally arraign the plaintiff in error. In fact he withheld any reason for such objection. If reason there was for such objection, the trial judge who could not but assume that the proceedings were entirely regular, was entitled to have his attention directed to an omission solely within the knowledge of plaintiff in error, and plaintiff in error under such circumstances, having concealed an unimportant irregularity should assume the burden thereof, if burden there be and be held to have waived arraignment and the right to formally plead.

Particularly apt is the language of Chief Justice Winslow of the Wisconsin Supreme Court in overruling the long established precedent of that court on a point of the same nature as that presented here. In the case of *Hack vs. State,* 124 N. W. p. 492 at page 495, he said:

> "Surely the defendant should have every one of his constitutional rights and privileges, but should he be permitted to juggle with them? Should he be silent where he ought to ask for some minor right which the court would at once give him, and then when he has had his trial, and the issue has gone against him, should he be heard to say there is error because he was not given his right? Should he be allowed

to play his game with loaded dice? Should justice travel with leaden heel because the defendant has secretly stored up some technical error, not affecting the merits, and thus secure a new trial because forsooth he can waive nothing? We think not. We think that sound reason, good sense, and the interests of the public demand that the ancient strict rule framed originally for other conditions be laid aside at least so far as all prosecution for offenses less than capital are concerned.

We believe that it has been laid aside in fact (save for the single exception that trial by a jury of twelve (12) cannot be waived unless authorized by a specific law) by the former decisions of this court. It is believed that this court has uniformly attempted to disregard mere formal errors and technical objections, not affecting any substantial right, and to adhere to the spirit of the law which giveth life rather than the letter which killeth."

This decision is in accord with the trend of modern criminal law. Courts have been so reluctant to lay aside technical rules dignified by age, even after all reason for such rules has ceased to exist that public opinion has crystallized into legislation in a great many states in spirit commanding the courts to look to the merits of the controversy,

disregarding all mere technicalities. Such is the law of the State of Washington set forth in Section 1752 Remington & Ballinger's Code as follows:

> "The Supreme Court shall hear and determine all causes removed thereto in the manner hereinbefore provided, upon the merits thereof disregaring all technicalities, and shall upon hearing consider all amendments which could have been made as made."

Followng the spirit of such legislation, the Supreme Court of this state has consistently cut loose from all such interferences with the administration of justice, and upon the point in question here, have held that:

> "Where a defendant without objection enters upon the trial of a criminal case in which he has failed to enter a plea, and the case is heard on the merits by the prosecution and defense, as if a plea of not guilty had been interposed, and the instructions of the court give the jury to understand that every material fact charged in the information is in issue, such error is without prejudice, being a mere irregularity, not affecting any substantial right of the defendant"

from the case of *State vs. Straub,* 16 Wash. 111, to the present case of *State vs. Garland,* 65 Wash. 666.

That the formality of arraignment and plea may be waived either expressly or impliedly as is held in the Garland case, *supra,* has been quite generally held as is indicated by the following decisions:

Bassett vs. State, 33 So. 262, 44 Fla. 2;

Hudson vs. State, 45 S. E. 66-117, Ga. 704;

Fenter vs. State, 33 Ind. 283;

Meyers vs. State, 59 N. E. 1052, 156 Ind. 388.

Gaines vs. U. S., 37 S. W. 98, 1 Ind. T. 296.

Roper vs. U. S., 104 S. W. 584;

Utterback vs. Com., 105 Ky. 723, 49 S. W. 479.

State vs. Rasberry, 37 So. 545, 113 La. 651.

State vs. Brock, 39 S. E. 359, 61 S. C. 141;

McCampbell vs. State, 93 S. W. 100, 116 Tenn. 98;

United States vs. Molloy, 31 Fed. 19;

State vs. Thompson, 95 Iowa, 464, 64 N. W. 419;

State vs. Glave, 51 Kan. 330, 33 Pac. 8;

People vs. Tower, 63 Hun. 624.

Plaintiff in error relies upon the case of *Crain vs. U. S.*, 162 U. S. 625, a case decided by this court eighteen years ago, in which it is held that arraignment and plea are essential to due process of law, guaranteed to the citizen by the fourteenth amendment.

We agree that a state could not pass a law providing for trial without arraignment and plea, but do not believe that the *Crain* case goes to the extent of holding that a state could not pass a law providing that a defendant had the right to, and could waive such formaility if he saw fit. In fact such laws have been passed in some states and their validity has never been questioned.

Hudson vs. State, 45 S. E. 66-117 Ga. 704;

Gaines vs. U. S., 37 S. W. 98-1 I. T. 296;

Utterback vs. Com., 105 Ky. 723.

Further it is the law in every jurisdiction, as a matter of necessity, that where a defendant fails or refuses to plead, the court shall direct that a plea of not guilty be entered, which is in effect a waiver by defendant of his right to plead. And if a state may by legislation provide that a citizens may waive such constitutional right, it is not merely an express enactment of what is already inherent in the law, and would a judicial finding that a defendant

who comes into court with his attorney, fully advised of all his rights and furnished with every means of making his defense, concealing from the court the omission of a privilege, which he could have for the asking, waives such privilege, come within the inhibition of the fourteenth amendment? We think that it should not be so held.

As ~~we~~ said in the case of *Hack vs. State supra*:

> "the ancient doctrine that the accused could waive nothing was unquestionably founded upon the anxiety of the courts to see that no innocent man should be convicted.
>
> It arose in those days when the accused could not testify in his own behalf, was not furnished with counsel, and was punished, if convicted, by the death penalty or some other greivous punishment out of all proportion to the gravity of the crime. Under such circumstances it was well perhaps that such a rule should exist, and well that every technical requirement should be insisted on when the state demanded its meed of blood. Such a course raised up a sort of barrier which the court could utilize when a prosecution was successful, which ought not to have been successful, or when a man without money, without counsel, without ability to summon witnesses, and not permitted to tell his own story, had been unjustly convicted, but yet under the ordinary principle of waiver as

applied to civil matters, had waived every defect in the proceedings. Thanks to the humane policy of the modern criminal law we have changed all these conditions. The man now charged with crime is furnished the most complete opportunity for making his defense. He may testify in his own behalf; if he be poor, he may have counsel furnished him by the state, and may have his witnesses summoned and paid for by the state; not unfrequently he is thus furnished counsel more able than the attorney for the state, in short, the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation. The reasons which in some sense justified the former attitude of the courts have therefore disappeared, save perhaps in capital cases and the question is, Shall we adhere to the principle based upon conditions that no longer exist? No sound reason occurs to us why a person accused of a lesser crime or misdemeanor, who comes into court with his attorney, fully advised of all his rights and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask just as a party to a civil action waives such a right by not asking for it."

This case differs from the *Crain* case in a material particular. Plaintiff in error was arraigned upon, and plead not guilty to an information in this case, identical with the second information with the exception that it was changed to meet the proof that it was a check for one thousand dollars that was obtained, instead of one thousand dollars in money. It alleged the same transaction as was alleged in the first, a copy of it was delivered to plaintiff in error through his attorney, and he was so fully aware of its contents, that he moved to quash, and moved to strike the very portion in which it differed from the first. Every purpose of arraignment and plea was served just as effectively and fully as though plaintiff had called the court's attention to his right to be arraigned and plead, and it had been accorded him. Furthermore, the *Crain* case arose in the United States court, and was decided according to the fifth amendment, whereas this case arose in the state court, and comes to this court from the court of last resort of the State of Washington, which has affirmed the judgment of the trial court.

It will be noted that the *Crain* case was decided almost two decades ago, and at that time the court was substantially divided upon the question presented. Since that time it can safely be assumed that strict adherence to purely technical rules, has not gained ground in modern criminal law, and

that the dissenting opinion of Judge Peckham, concurred in by Justices Brewer and White is more in keeping with the modern policy of law than the prevailing opinion of the court.

We believe that his conclusion that

> "He ought to be held to have waived that which under the circumstances would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until as in this case,"

is applicable in this case and it should be so held.

It is not among the contentions in plaintiff's in error brief that he was in any way prejudiced by the omission of the formality which he failed to insist upon. Against the amended information he had moved to quash, to strike, and to make more definite and certain. Counsel in his behalf had been heard upon each motion. At the time of trial he then had left only one of two courses; he could plead "guilty," or put the state to proof of every material allegation and have the question of his guilt or innocence submitted to a jury under full and complete instructions. This latter course he

pursued. We submit that plaintiff in error was accorded a fair trial, and that every right guaranteed under the constitution was secured to him.

II.

Plaintiff's in error second assignment of error presents no federal constitutional question that is not presented in his first assignment. The question of filing one or more informations against a defendant charging the same offense is a matter of state regulation.

> "The state courts have sole jurisdiction to administer state criminal laws, and their decision as to their validity and their construction by the highest state courts are followed by federal courts wherever they are called upon to pass upon them almost infallibly more uniformly than in civil cases. * * * But the federal courts have no concurrent jurisdiction with the state courts in criminal law, as they have in civil cases, but the state courts have exclusive jurisdiction in enforcing criminal laws of the state and therefore state decisions upon its criminal laws are conclusive on the federal courts."

Brannon, 14th Amendment 417;

New York vs. Eno, 155 U. S. 89.

In the case of *State vs. Fredrick,* 4 Wash. p. 207, it was held:

> "It is also conceded that several indictments may be returned against one defendant before his trial, all covering the same offense, and that he may be tried on either of them the prosecution making the election. He (counsel) also suggests that if the practice is sustained, there would be nothing to prevent the prosecution from trying and convicting a prisoner for manslaughter, and after he had served his sentence, indicting and trying him for murder of the same person; or from so re-indicting and trying him after his acquittal on the first charge. But the logic of this proposition fails, because in both these supposed cases, actual jeopardy would have been suffered which would bar the second prosecution. So in this case, if the conviction of the appellant be now sustained in any degree the judgment entered against him in pursuance thereof will forever be a bar to any further prosecution."

And in *State vs. Gile,* 8 Wash. p. 14:

> "Indeed the appellant would have had no legal ground for complaint if a second information had been filed against him during the pendency of the first."

From the record it is quite apparent that the state had entirely abandoned the first information by reason of the fact that an amended information was filed in the case by reason of the granting of a new trial on the ground of a variance. Nothing could be more evident, and if under such circumstances an election was necessary the record certainly shows no equivocation on the part of the state as to what information the defendant was being tried upon.

We submit that plaintiff's contention that he did not know upon which information he was being tried is frivolous and without merit.

For the foregoing reason we respectfully submit that the writ of error should be dismissed and the judgment affirmed.

Respectfully submitted,

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